APPENDIX 2

Stamped
Court of Appeal Second District
Filed November 4, 1993, Joseph A. Lane, Clerk
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NOT TO BE PUBLISHED

B060717
(Super.Ct.No. P733892)

IN THE COURT OF APPEAL
OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

ALEXANDER WEIR III ET AL.,
Plaintiffs and Respondents,
v.
JOHN WENTWORTH EVANS,
Defendant and Appellant.

APPEAL from a judgment of the Superior Court of Los Angeles County, Edward M. Ross, Judge. Affirmed.

Hosp, Granieri & Cairns, John C. Doyle, Mark E. Benson, Cairns, Doyle, Lans, Nicholas & Soni, and John C. Doyle for Defendant and Appellant.

Fields, Fehn & Sherwin, H. Thomas Fehn, and Gregory J. Sherwin for Plaintiff and Respondent.

John Evans appeals from the judgment entered following a bifurcated court trial which resulted in his being removed as trustee of the Weir Family Trusts and surcharged for breach of fiduciary duty. We affirm.

BACKGROUND

In 1978 and 1981, Alexander Weir, Jr., and his wife, Florence Weir, established irrevocable family trusts for the benefit of their children, Alexander Weir III, Bruce Weir, and Carol Ashman.[1] The trusts named Evans, Weir's long-time friend and attorney, as sole trustee.

On April 28, 1989, the beneficiaries filed a petition to remove Evans as trustee and for an accounting. Following a contested hearing, Evans was removed as trustee by order filed January 10, 1990. He was further ordered to provide a final accounting on the trusts within 90 days, at which time the beneficiaries' request for a surcharge would be considered.

On April 6, 1990, Evans filed his final accounting. The following June 11, the beneficiaries filed a document objecting to the accounting. Three days later, Evans's attorney substituted out of the matter and Evans substituted himself in propria persona. By order dated September 20, 1990, the beneficiaries received relief from an automatic stay which resulted from Evans having filed for personal bankruptcy.[2] After several continuances, trial on the contested accounting was set for February 11, 1991.

On February 5, 1991, counsel substituted in to represent Evans. On February 7, Evans, through new counsel, filed an ex parte request for a 90-day continuance of the trial. The request was denied.

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[1]Settlors Alexander Weir, Jr., and Florence Weir will be referred to collectively in this opinion as "Weir"; their children will be referred to as "the beneficiaries."

[2]The record does not reveal when Evans filed for bankruptcy.

Trial was conducted on February 11 and 13, 1991. The bulk of the evidence involved Evans's use of trust assets to purchase Eurobonds. From the record, it appears that the transactions consisted of the following steps:

Weir loaned, interest free, approximately $400,000 to one of the trusts. That trust, in turn, loaned these funds to Evans in his personal capacity. Evans then placed the funds in a personal account, managed by a Swiss investment advisor, through which the Eurobonds were purchased.[3] The interest on the bonds was to be paid to, and retained by, the trust. However, due to currency fluctuations, Eurobonds became worthless as an investment.

Evans conceded that Eurobonds were highly speculative, and that their purchase "would be imprudent in terms of the standard for investing trust funds."[4] However, he sought to defend himself on grounds that he had been instructed by Weir to invest in the bonds,[5] and that the bonds had been purchased with funds which were not actually part of the trust.

The trial court ruled in favor of the beneficiaries, surcharging Evans $404,500 for breach of fiduciary duty.

ISSUES

Evans contends that the trial court improperly (1) denied his request to continue trial; (2) refused to permit the filing of an amended accounting; and (3) restricted the scope of evidence he was allowed to present at trial.

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[3]Evans also placed other investors' funds in this account.

[4]The trust instruments specifically required that the trusts undertake only such investment "that men of prudence, discretion, and intelligence acquire for their own account."

[5]Weir denied that he instructed Evans to purchase the bonds, testifying that the investment was Evans's idea.

DISCUSSION

1. Request to Continue Trial

In a declaration in support of Evans's ex parte request for a continuance, which was filed four days before trial, Attorney John Sullivan stated that his firm had been representing Evans since December 1991 in bankruptcy litigation regarding the dischargeability of debts to, inter alia, Weir and the beneficiaries. Such representation had been provided through an insurance carrier, which provided coverage to an employee group to which Evans belonged. On January 31, 1991, bankruptcy counsel for Weir and the beneficiaries informed Sullivan of the case of *Grogan et al. v. Garner* (1991) 498 U.S. 279, which had been filed the previous January 15.[6] Thereafter, the insurance carrier accepted Evans' tender of his defense in the instant litagation, and insurance counsel substituted in to represent Evans.

After denial of the requested continuance, Evans associated as cocounsel with insurance defense counsel for the purpose of trial. As the trial started, Evans told the court that he was "prepared today to go forward." He then proceeded to represent himself at trial.

Evans contends that the trial court committed prejudicial error in refusing to continue the matter so that new counsel could adequately prepare the case. We disagree.

"In ruling on a motion for a continuance, the court considers all matters relevant to a proper determination of the motion . . . " (Standards of Judicial Administration, § 9; see also Cal. Rules of Court, rule 375(a).) The court

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[6] *Grogan* resolved a split among the circuits and held that fraud would prevent a debt from being discharged in bankruptcy if proved by a preponderance, rather than clear and convincing evidence. Thus, a state court fraud judgment based on the preponderance standard would be entitled to collateral estoppel effect in the bankruptcy court. (*Id.* at pp. 281-283.)

exercises great discretion in ruling on motion for a continunace, and that exercise of discretion will be overturned only upon a showing of manifest abuse. (*In re Marriage of Johnson* (1982) 134 Cal.App.3d 148, 154-155; see 7 Witkins, Cal. Procedure (3d ed. 1985) Trial, §§ 7-9, pp. 24-26.)

Evan's personal bankruptcy had already delayed resolution of the beneficiaries' action. As an attorney, Evans was capable of continuing to represent himself. His insurance carrier's apparent change of heart following Supreme Court resolution of an unsettled legal issue did not provide any basis upon which to require yet another delay in the proceedings.

Moreover, even if a continuance should have been granted, we may not provide Evans with any relief on appeal unless he can demonstrate that denial of the continuance resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13; Code Civ. Proc., § 475; *Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1069). Here, despite the fact that Evans has been continuously represented by the same counsel since the trial on the accounting, his briefs on appeal, filed more than two years after that representation began, fail to suggest how he might have been prejudiced by being required to begin trial on February 11, 1991. Accordingly, Evans's claim must fail.

2. Amended Accounting

In both his request for a continuance and at the conclusion of trial, Evans asked for leave to amend the final accounting he had filed on April 6, 1990. Evans asserted that, because of lack of funds and expertise, the accounting he had submitted may have been inaccurate. The trial court, which had characterized (somewhat colorfully) Evans's accounting as a "piece of trash," denied Evans's requests. The court determined the damages it awarded to the benefi-

ciaries based on the final accounting filed by Evans and on the evidence adduced at trial.

On appeal, we reject Evans's contention that the trial court committed a prejudicial abuse of discretion in denying leave to file a new accounting. As with the issue of a continuance, Evans has failed to suggest how the ability to amend the accounting would have inured to his benefit. He is not entitled to relief on appeal.

3. Scope of Evidence

In discussions with counsel during trial on the accounting, the court consistently defined the relevant issue being tried as whether Evans had been instructed to invest in Eurobonds on behalf of the trust, or whether the investment was Evans' idea. Consistent with this definition, the court refused to permit Evans to present evidence on collateral issues. We find no error.

Evans did not provide any authority to the trial court, nor has he provided any to this court, which would support the notion that money loaned to a trust for the purpose of producing interest income is not governed by the principles of trust administration embodied in Probate Code sections 16000 et sequitur.[7] Indeed, at the hearing which resulted in his being removed as trustee, Evans admitted that the loans from Weir for the purchase of Eurobonds were an "[a]sset of the trust." Accordingly, Evans was liable to the beneficiaries for the loss of the proceeds of the loans. (Prob. Code, § 16440, subd. (a)(1).)

Evans asserts that he was improperly denied permission to introduce evidence of his "good faith" in purchasing the

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[7]Evans's reliance on Probate Code sections 16227 (management of trust property) and 16440 (measure of liability for breach of trust assessed in relation to the trust estate) is misplaced. These statutes merely recognize the existence of trust assets; they do not purport to define which assets are or are not part of a trust.

Eurobonds. This assertion is based upon a provision in the trust documents relieving Evans of liability for transactions undertaken in reliance on the advice of "professional investment counsel." In making this assertion, Evans also relies on Probate Code section 16461, subdivision (b)(1), which provides that a trustee may not be relieved of liability if the trust has been breached "intentionally, with gross negligence, in bad faith, or with reckless indifference to the interest of the beneficiary." However, Evans never asserted the defense of "good faith" in the trial court; consequently, there is no record on which we may review it. Moreover, based on Evans's admission at the hearing on his removal as trustee that he never told the Swiss investment advisor that the account included trust assets, such a defense could not have succeeded.

During the course of trial, the court made clear its willingness to hear all evidence relevant to Evans's consent defense. However, the only evidence that Evans presented on this topic was that *Weir* directed the investments in Eurobonds. Because the limitation of liability of probate Code section 16463 is applicable only where consent is given by the *beneficiaries*, it is apparent that Evans actually had no defense to the charge that he breached the trusts by engaging in admittedly speculative investments.

In our review of the appellate record, we have encountered no circumstance in which the trial court precluded Evans from presenting evidence which would have provided a valid defense to the contested accounting. Accordingly, we reject his contention that such limitation prejudiced his case.[8]

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[8]Based on this conclusion, we need not determine whether a memorandum opinion of the bankruptcy court in an unrelated matter between the parties is a proper subject of judicial notice in this case.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

MASTERSON, J.

We concur:

SPENCER, P. J.
VOGEL (MIRIAM A.), J.